

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FELICIA BETH BAUMGARDEN,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration,
Defendant.

NO. 2:14-cv-00374-SAB

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT;
DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 12, and Defendant's Motion for Summary Judgment, ECF No. 13. The motions were heard without oral argument. Plaintiff is represented by Dana Madsen. Defendant is represented by Assistant United States Attorney Pamela De Rusha and Special Assistant United States Attorney Benjamin J. Groebner.

I. Jurisdiction

On August 15, 2011, Plaintiff filed a Title II application for disability insurance benefits and also filed a Title XVI application for supplemental security income (SSI) on the same day. Plaintiff alleged she is disabled beginning January

1, 2004, due to agoraphobia, social phobia, depression, anxiety, and PTSD.¹

Her application was denied initially on October 25, 2011, and again denied on reconsideration on January 6, 2012. A timely request for a hearing was made. On March 8, 2013, Plaintiff appeared and testified at a hearing held in Spokane, Washington before Administrative Law Judge (ALJ) Moira Ausems. Dr. R. Thomas McKnight, medical expert, and K. Diane Kramer, vocational expert, also appeared and testified. Plaintiff was represented by attorney Dana Madsen.

The ALJ issued a decision on May 3, 2013, finding that Plaintiff was not disabled. Plaintiff timely requested review by the Appeals Council, which denied her request for review on September 22, 2014. The Appeals Council's denial of review makes the ALJ's decision the final decision of the Commissioner. 42 U.S.C. §405(h).

Plaintiff filed a timely appeal with the U.S. District Court for the Eastern District of Washington on November 11, 2014. The instant matter is before this Court pursuant to 42 U.S.C. § 405(g).

II. Sequential Evaluation Process

The Social Security Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A). A claimant shall be determined to be under a disability only if her impairments are of such severity that the claimant is not only unable to do her previous work, but cannot, considering claimant's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §423(d)(2)(A).

The Commissioner has established a five-step sequential evaluation process

¹ She later amended the alleged onset date at the hearing to November 1, 2009.

1 for determining whether a person is disabled. 20 C.F.R. § 416.920(a)(4); *Bowen v.*
2 *Yuckert*, 482 U.S. 137, 140-42 (1987).

3 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R. §
4 416.920(b). Substantial gainful activity is work done for pay and requires
5 compensation above the statutory minimum. 20 C.F.R. § 416.972(a); *Keyes v.*
6 *Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in
7 substantial activity, benefits are denied. 20 C.F.R. § 416.971. If she is not, the ALJ
8 proceeds to step two.

9 Step 2: Does the claimant have a medically-severe impairment or
10 combination of impairments? 20 C.F.R. § 416.920(c). If the claimant does not
11 have a severe impairment or combination of impairments, the disability claim is
12 denied. A severe impairment is one that lasted or must be expected to last for at
13 least 12 months and must be proven through objective medical evidence. 20 C.F.R.
14 § 416.909. If the impairment is severe, the evaluation proceeds to the third step.

15 Step 3: Does the claimant's impairment meet or equal one of the listed
16 impairments acknowledged by the Commissioner to be so severe as to preclude
17 substantial gainful activity? 20 C.F.R. § 416.920(d); 20 C.F.R. § 404 Subpt. P.
18 App. 1. If the impairment meets or equals one of the listed impairments, the
19 claimant is conclusively presumed to be disabled. *Id.* If the impairment is not one
20 conclusively presumed to be disabling, the evaluation proceeds to the fourth step.

21 Before considering Step 4, the ALJ must first determine the claimant's
22 residual functional capacity. 20 C.F.R. § 416.920(e). An individual's residual
23 functional capacity is her ability to do physical and mental work activities on a
24 sustained basis despite limitations from her impairments.

25 Step 4: Does the impairment prevent the claimant from performing work she
26 has performed in the past? 20 C.F.R. § 416.920(f). If the claimant is able to
27 perform her previous work, she is not disabled. *Id.* If the claimant cannot perform
28 this work, the evaluation proceeds to the fifth and final step.

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1 Step 5: Is the claimant able to perform other work in the national economy
2 in view of her age, education, and work experience? 20 C.F.R. § 416.920(g).

3 The initial burden of proof rests upon the claimant to establish a prima facie
4 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
5 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
6 mental impairment prevents her from engaging in her previous occupation. *Id.* At
7 step five, the burden shifts to the Commissioner to show that the claimant can
8 perform other substantial gainful activity. *Id.*

9 **III. Standard of Review**

10 The Commissioner's determination will be set aside only when the ALJ's
11 findings are based on legal error or are not supported by substantial evidence in
12 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
13 (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
14 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
15 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial
16 evidence is "such relevant evidence as a reasonable mind might accept as adequate
17 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the
18 ALJ's denial of benefits if the evidence is susceptible to more than one rational
19 interpretation, one of which supports the decision of the administrative law judge.
20 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). "If the evidence can
21 support either outcome, the court may not substitute its judgment for that of the
22 ALJ." *Matney*, 981 F.2d at 1019.

23 A decision supported by substantial evidence will be set aside if the proper
24 legal standards were not applied in weighing the evidence and making the decision.
25 *Browner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988).
26 An ALJ is allowed "inconsequential" errors as long as they are immaterial to the
27 ultimate nondisability determination." *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d
28 1050, 1055 (9th Cir. 2006).

1 **IV. Statement of Facts**

2 The facts have been presented in the administrative transcript and the ALJ's
3 decision and will only be summarized here.

4 At the time of the hearing, Plaintiff was 27 years old. She finished the
5 eighth grade, but has obtained her GED. She has two children.² She previously
6 worked as an in-home caregiver and as an assistant preschool teacher at the
7 YMCA.

8 Plaintiff suffers from anxiety, panic attacks, depression, and migraines. She
9 rarely leaves the house alone. She doesn't have a driver's license. She also reports
10 she has pelvic pain, which limits her ability to stand or walk. She indicates that she
11 has poor memory, and needs reminders to take her medication and to perform her
12 household chores

13 For a significant period of time, Plaintiff used marijuana. She maintained
14 that it helped her symptoms. She reported she quit smoking marijuana in 2013.

15 **V. The ALJ's findings**

16 The ALJ found that Plaintiff met the insured status requirements of the
17 Social Security Act through March 31, 2013.

18 At step one, the ALJ found Plaintiff has not engaged in substantial gainful
19 activity since November 1, 2009, the application date. (Tr. 22.)

20 At step two, the ALJ found Plaintiff has the following severe impairments:
21 major depressive disorder; personality disorder; and cannabis dependence. (Tr. 22.)

22 At step three, the ALJ found that Plaintiff's impairments or combination of
23 impairments do not meet or medically equal Listing 12.04 (Affective Disorders);
24 12.08 (Personality Disorders), and 12.09 (Substance Addiction Disorders). (Tr. 24.)

25 The ALJ concluded that Plaintiff has the residual functional capacity to
26 perform the full range of work at all exertional levels except with the following
27

28 ² The ALJ erroneously stated that she has three children. (Tr. 26.)

1 nonexertional limitations: she can perform simple routine tasks, with no more than
2 brief superficial contact with coworkers and the general public (Tr. 25.)

3 At step four, the ALJ found Plaintiff was not capable of performing any past
4 relevant work. (Tr. 28.)

5 At step five, the ALJ found that Plaintiff is capable of making a successful
6 adjustment to other work that exists in significant numbers in the national
7 economy (Tr. 30.) As such, the ALJ concluded that Plaintiff has not been under a
8 disability, as defined in the Social Security Act, from November 1, 2009, through
9 May 3, 2013.

10 **VI. Issues for Review**

11 1. Did the ALJ commit reversible error by improperly discrediting
12 Plaintiff's symptom claims?

13 2. Did the ALJ commit reversible error by improperly considering and
14 weighing the medical opinion evidence?

15 **VII. Discussion**

16 **1. Plaintiff's Credibility**

17 The ALJ found that Plaintiff's statements concerning the intensity,
18 persistence, and limiting effects of her symptoms to be not entirely credible.
19 Specifically, she found that the objective medical evidence does not support the
20 level of impairment claims.

21 She found that Plaintiff's daily activities and medical reports overall do not
22 indicate that she has a complete inability to work, and she also relied on the fact
23 that she worked, although unsuccessfully, after her onset date. (Tr. 26.) She noted
24 the infrequency of the mental health treatment, and the fact that she did not show
25 up for her appointments and appeared to just go through the motions of treatment
26 in order to receive public assistance. (Tr. 26-27.) She also relied on the fact that
27 she was not forthcoming about her marijuana use.

1 An ALJ's assessment of a claimant's credibility is entitled to "great weight."
2 *Anderson v. Sullivan*, 914 F.2d 1121, 1124 (9th Cir.1990). When there is no
3 evidence of malingering, the ALJ must give "specific, clear and convincing
4 reasons" for rejecting a claimant's subjective symptom testimony. *Molina v. Astrue*,
5 674 F.3d 1104, 1112 (9th Cir. 2012) (citation omitted). If the ALJ's credibility
6 finding is supported by substantial evidence in the record, the reviewing court
7 "may not engage in second-guessing." *Thomas v. Barnhart*, 278 F.3d 947, 959
8 (9th Cir. 2002).

9 In recognition of the fact that an individual's symptoms can sometimes
10 suggest a greater level of severity of impairment than can be shown by the
11 objective medical evidence alone, 20 CFR 404.1529(c) and 416.929(c) describe
12 the kinds of evidence, including the factors below, that the ALJ must consider in
13 addition to the objective medical evidence when assessing the credibility of an
14 individual's statements:

15 1. The individual's daily activities; 2. The location, duration,
16 frequency, and intensity of the individual's pain or other symptoms; 3.
17 Factors that precipitate and aggravate the symptoms; 4. The type,
18 dosage, effectiveness, and side effects of any medication the
19 individual takes or has taken to alleviate pain or other symptoms; 5.
20 Treatment, other than medication, the individual receives or has
21 received for relief of pain or other symptoms; 6. Any measures other
22 than treatment the individual uses or has used to relieve pain or other
23 symptoms (*e.g.*, lying flat on his or her back, standing for 15 to 20
24 minutes every hour, or sleeping on a board); and 7. Any other factors
25 concerning the individual's functional limitations and restrictions due
26 to pain or other symptoms.

27 SSR 96-7P, 1996 WL 374186.

28 Here, the ALJ relied on factors in making her credibility determinations that
the Ninth Circuit has cautioned against using. For instance, Plaintiff should not be
penalized for trying to maintain employment. Rather than show that she is not
being credible about her symptoms, her unsuccessful work attempts reinforces the

1 conclusion that her limitations prevent her from obtaining and maintaining full
 2 time employment. Her activities of daily living are consistent with someone who
 3 has anxiety, panic attacks and depression. The identified activities are the type that
 4 she can do without contact with people she is not comfortable around. If she goes
 5 shopping, it is never by herself. Plaintiff's lack of mental health treatment is
 6 consistent with a person who has difficulty leaving the house. Plaintiff told her
 7 treatment physician that it was too stressful for her to leave the house to attend
 8 counseling. (Tr. 420.) Indeed, the transcript of the hearing suggests that Plaintiff
 9 was having difficulty testifying at the hearing. (Tr. 39, 69.) Finally, the record
 10 suggests that Plaintiff was not trying to hide her marijuana use when asked. Rather,
 11 it appears that she did not volunteer the information. Consequently, the ALJ's
 12 credibility determination is not supported by substantial evidence.

13 2. Medical Opinions

14 The ALJ is tasked with resolving conflicts in the medical evidence. *Andrews*
 15 *v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Generally speaking, three types of
 16 doctors provide medical evidence: treating doctors, examining doctors, and
 17 reviewing (non-examining) doctors. "By rule the Social Security Administration
 18 favors the opinion of a treating physician over non-treating physicians." 20 C.F.R.
 19 § 416.927³; *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). "If a treating
 20 physician's opinion is well-supported by medically acceptable clinical and
 21 _____

22 ³ 20 C.F.R. § 416.927(c)(2) states: Generally, we give more weight to opinions
 23 from your treating sources, since these sources are likely to be the medical
 24 professionals most able to provide a detailed, longitudinal picture of your medical
 25 impairment(s) and may bring a unique perspective to the medical evidence that
 26 cannot be obtained from the objective medical findings alone or from reports of
 27 individual examinations, such as consultative examinations or brief
 28 hospitalizations.

laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the case record, it will be given controlling weight.” *Orn*, 495 F.3d at 631. If a treating physician’s opinion is not given “controlling weight” because it does not meet these requirements, the ALJ should consider (i) the length of the treatment relationship and the frequency of examination by the treating physician; and (ii) the nature and extent of the treatment relationship between the patient and the treating physician in determining the weight it will be given. *Id.* The ALJ is not required, however, to merely accept the opinion of a treating doctor. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Where contradicted, the ALJ may reject the opinion for specific and legitimate reasons that are supported by substantial evidence in the record. *Id.* On the other hand, where the treating doctor’s opinion is uncontradicted, the ALJ can only reject it for clear and convincing reasons. *Id.*

The opinions of examining physicians are afforded more weight than those of non-examining physicians. *Id.* Factors the ALJ should consider in evaluating any medical opinion (not limited to the opinion of the treating physician) include: (1) the amount of relevant evidence that supports the opinion and the quality of the explanation provided; (2) the consistency of the medical opinion with the record as a whole; (3) the specialty of the physician providing the opinion; and (4) other factors, such as the degree of understanding a physician has of the Administration’s disability programs and their evidentiary requirements and the degree of his or her familiarity with other information in the case record. *Orn*, 495 F.3d at 631.

Dr. Alisa Hideg is one of Plaintiff’s treating physicians. In March, 2011, she indicated that due to agoraphobia and social phobia, Plaintiff had difficulty being around other people. (Tr. 397.) She believed Plaintiff was only capable of working 1 to 10 hours per week. (Tr. 397.) Her counselor, Margaret Lauzon, also concluded that Plaintiff would be limited to 1 to 10 hours a week, because of her panic attacks. (Tr. 395) Dr. Kurt Fine concluded in September, 2010, that Plaintiff

1 would not be able to work at all due to her pelvic pain that began after her IUD
2 removal. (Tr. 391.)

3 The ALJ gave little weight to Plaintiff's treating physician's opinions
4 because they involved a check-box or form report that did not include significant
5 explanation for their conclusions, and because the definitions and standards used
6 by the Department of Social and Health Services differs from the definition and
7 standards contained in the regulations for assessing mental disorders. (Tr. 28.) She
8 concluded these reports were not supported by the treatment notes and were
9 clearly done to aid Plaintiff with obtaining public assistance. (Tr. 28.)

10 These reasons provided by the ALJ for rejecting Plaintiff's treating
11 physicians do not meet the standards set forth above. As such, remand is warranted.

12 **3. RFC Assessment**

13 The ALJ gave great weight to Dr. Robinson's opinion. Dr. Robinson
14 completed an assessment for Disability Determination Services. The ALJ noted Dr.
15 Robinson found that Plaintiff was capable of carrying out short and simple
16 instructions and her concentration, persistence might be affected, but she was
17 capable of working with superficial contact with the public and coworkers. (Tr.
18 27.) The ALJ then incorporated these limitations into the Residual Functional
19 Capacity determination by indicating that Plaintiff had the following nonexertional
20 limitations:

21 She can perform single routine tasks, with no more than brief superficial contact
22 with coworkers and the general public. (Tr. 25.)

23 This RFC, however, does not include all the limitations identified by Dr.
24 Robinson after he reviewed Plaintiff's medical records. In addition to those relied
25 on by the ALJ, Dr. Robinson concluded that Plaintiff would be moderately limited
26 in her ability to perform activities within a schedule, maintain regular attendance,
27 and be punctual within customary tolerances (Tr. 96.) He also found that her
28 ability to complete a normal workday and workweek without interruptions from

1 psychologically based symptoms and to perform at a consistent pace without an
2 unreasonable number and length of rest periods was moderately limited.

3 When asked by Plaintiff's counsel, the vocational expert testified that if
4 these additional limitations were considered, an individual would have a difficult
5 time keeping the job. (Tr. 68.) ("If you're having difficulties with all of these
6 things at least one-third of the time, I don't believe any type of employment would
7 be able to be maintained.").

8 The ALJ rejected the vocational expert's conclusion and instead relied on
9 Dr. Robinson's conclusion that Plaintiff was capable of working with superficial
10 contact with the public and coworkers. The ALJ concluded that the additional
11 moderate limitations identified by Dr. Robinson were not supported by the
12 objective medical evidence..

13 The ALJ's decision to reject portions of Dr. Robinson's findings is not
14 supported by substantial evidence, especially since Dr. Robinson conducted a
15 review of the medical records and also found that Plaintiff was only partially
16 credible. Even when viewing Plaintiff as partially credible, he found that she
17 would have difficulty with completing a normal workday and workweek without
18 interruptions, although his conclusion that she was fully employable is at odds
19 with this limitation. The ALJ chose to rely on his conclusion that she was
20 employable and ignore his conclusion that she would have difficulty with
21 completing a normal workday and workweek. Additionally, Dr. Robinson's
22 findings regarding Plaintiff's ability to complete a normal workday and workweek
23 are consistent with the conclusions made by Plaintiff's treating physicians.

24 Ultimately, the ALJ gave Dr. Robinson's finding regarding Plaintiff's
25 limitations great weight, and thus, all of his findings should have been given great
26 weight. The ALJ's conclusion that Dr. Robinson's finding of moderate limitations
27 with the normal workday and workweek was not supported by the record is
28 incorrect. Rather, the record supports Dr. Robinson's conclusion. When all of the

1 limitations (rather than just the ones the ALJ chose to use) were presented to the
2 vocational expert, she concluded that Plaintiff was not employable.

3 Consequently, the RFC relied on by the ALJ is incomplete. It should have
4 included the additional limitations identified by Dr. Robinson. Additionally, the
5 ALJ erred in rejecting the vocational expert's opinion that relied on all the
6 limitations identified by Dr. Robinson and substituting Dr. Robinson's opinion
7 regarding the employability of Plaintiff.

8 **4. Conclusion**

9 As set forth above, the ALJ's credibility determination is not supported by
10 substantial evidence. In addition, the ALJ erred in rejecting Plaintiff's treating
11 physicians' opinions. Finally, the ALJ erred in not incorporating all of the
12 limitations identified by Dr. Robinson in Plaintiff's RFC, and substituting Dr.
13 Robinson's opinion that Plaintiff is employable for the opinion of the vocational
14 expert who said she was not.

15 The Court has discretion in deciding whether to remand for further
16 proceedings or for immediate payment of benefits. *Harman v. Apfel*, 211 F.3d
17 1172, 1178 (9th Cir. 2000). The issue turns on the utility of further proceedings. A
18 remand for an award of benefits is appropriate when no useful purpose would be
19 served by further administrative proceedings or when the record has been fully
20 developed and the evidence is insufficient to support the Commissioner's decision.
21 *Strauss v. Comm'r*, 635 F.3d 1135, 1138 (9th Cir. 2011) (quoting *Benecke v.*
22 *Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004).

23 Under the "crediting as true" doctrine, evidence should be credited and an
24 immediate award of benefits directed where: (1) the ALJ has failed to provide
25 legally sufficient reasons for rejecting the evidence; (2) no outstanding issues exist
26 that must be resolved before a determination of disability can be made; and (3) it is
27 clear from the record that the ALJ would be required to find the claimant disabled
28 were such evidence credited. *Id.* The "crediting as true" doctrine is not a

1 mandatory rule in the Ninth Circuit, but leaves the court flexibility in determining
2 whether to enter an award of benefits upon reversing the Commissioner's decision.
3 *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (citing *Bunnell v. Sullivan*,
4 947 F.2d 341, 348 (9th Cir. 1991)).

5 Here, there are no outstanding issues to resolve. Based on the vocational
6 expert's testimony, it is clear Plaintiff is disabled when all the limitations found by
7 Dr. Robinson, whose testimony the ALJ gave great weight, is included in the RFC.
8 As such, it is appropriate to remand for the award of benefits.

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment, ECF No. 12, is **GRANTED**.

11 2. Defendant's Motion for Summary Judgment, ECF No. 13, is **DENIED**.

12 3. The decision of the Commissioner denying benefits is reversed and
13 remanded for an award of benefits.

14 4. The District Court Executive is directed to enter judgment in favor of
15 Plaintiff and against Defendant.

16 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
17 file this Order and provide copies to counsel.

18 **DATED** this 27th day of October, 2015.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

24 Stanley A. Bastian
25 United States District Judge
26
27
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